Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	DA 08-1913
	)	
Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt under Section 253 State and Local Ordinances that Classify All Wireless Siting Proposals as Requiring a Variance.	)	WT Docket No. 08-165

Comments on behalf of the Cable and Telecommunications Committee of the New Orleans City Council

The Cable and Telecommunications Committee of the New Orleans City Council, through its undersigned counsel, submits these comments in response to the Public Notice released by the Federal Communications Commission ("FCC" or "Commission") on August 14, 2008.

Introduction

The Cable and Telecommunications Committee of the New Orleans City Council oversees the City Council's regulatory authority over cable and telecommunication matters and makes recommendations to the full City Council concerning regulations and services. The Cable and Telecommunications Committee ("Committee") also reviews and sets policy concerning the granting and oversight of cable and telecommunications franchises in New Orleans.

The City of New Orleans' Comprehensive Zoning Ordinance plays an integral role with respect to cable and telecommunication facilities, as the ordinance regulates the placement, type and size of various telecommunication structures. The Committee has a compelling interest in zoning ordinances, as they relate to cable and telecommunication facilities. In particular, the Committee makes recommendations with respect to zoning ordinances to help promote the distribution and deployment of cable and telecommunication facilities, while fully protecting the health, safety and welfare of the City of New Orleans and its citizens.

Preliminary Statement

The wireless industry has requested the FCC to create a new set of rules for antenna and tower site approvals. The proposed rules provide that if the local government fails to render a final decision by a certain deadline (generally 45 days or 75 days from the date of the request), a tower or antenna site would be automatically deemed approved. Furthermore, the proposed rules would preempt local zoning ordinances that require wireless providers to obtain variances, such as waivers to setback requirements.

Such proposed rules, however, are contrary to Congress' intent, as Congress has specifically preserved local zoning authority in the Telecommunications Act.[1] Further, the proposed rules are not necessary and conflict with the flexibility and balancing approach (between the needs of zoning authorities and wireless service providers) that Congress has established. A "one size fits all approach" does not work with respect to tower siting. What may an unreasonable deadline or setback requirement for one local zoning authority may be completely

[1] 47 U.S.C. § 151 *et seq.*

reasonable for another.

Summary of the Proceeding

In this docket, the FCC will consider whether to establish certain rules which would significantly change how local zoning authorities approve requests for placement of towers and other telecommunication facilities.

On July 11, 2008, CTIA - The Wireless Association ("CTIA") filed a petition requesting that the Commission issue a Declaratory Ruling clarifying provisions of the Telecommunications Act regarding state and local review of wireless facility siting applications. CTIA seeks clarification of provisions in Section 332(c)(7) of the Telecommunications Act that it contends are ambiguous and have been interpreted in a manner that has allowed zoning authorities to impose unreasonable impediments to wireless facility siting and the provision of wireless services.

CTIA also requests the Commission to preempt local ordinances and state laws that allegedly subject wireless facility siting applications to unique, burdensome requirements, in violation of Section 253(a) of the Telecommunications Act, which bars state and local laws that "prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."

Specifically, in its petition, CTIA asks FCC to take action relating to the time frames in which zoning authorities must render a final decision on siting requests, their power to restrict competitive entry by multiple providers in a given area, and their ability to impose certain procedural requirements (e.g., setbacks) on wireless service providers. The actions sought are

summarized below.

(1) CTIA requests the FCC to establish specific deadlines by which zoning authorities must render a final decision on a siting request.

CTIA alleges that the law is unclear as to when a zoning authority has "failed to act" and unclear as to when a claim becomes suitable for review in court. CTIA contends that the Telecommunications Act does not set forth uniform guideposts for courts and zoning authorities to follow with respect to requests for tower siting.

To eliminate this alleged ambiguity, which CTIA contends exists in the Telecommunications Act, CTIA asks the FCC to clarify the time period in which a state or local zoning authority will be deemed to have failed to act on a wireless facility siting application. CTIA states that the Commission should issue a declaratory ruling explaining that:

(i) a failure to act on a wireless facility siting application only involving collocation occurs if there is no final action within 45 days from submission of the request to the local zoning authority; and

(ii) a failure to act on any other wireless siting facility application occurs if there is no final action within 75 days from submission of the request to the local zoning authority.

(2) CTIA requests the FCC to rule that a siting request shall be automatically deemed approved if the zoning authority does not render a final decision before the deadline.

CTIA asks the FCC to implement procedural steps whereby, if a zoning authority fails to act within the above time frames, the application shall be "deemed granted." Alternatively, CTIA asks the FCC to establish a presumption that entitles an applicant to a court-ordered injunction granting the application, unless the zoning authority can justify the delay.

(3) CTIA requests the FCC to limit a zoning authority's reasons for deny a siting request.

The law forbids state and local decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services." According to CTIA, some localities have allegedly adopted the view that a particular decision does not necessarily prohibit wireless service, unless it precludes *all* wireless providers from offering service in an area. CTIA asks the FCC to rule that the Act prohibits zoning decisions that have the effect of preventing a specific provider from providing service to a location on the basis of another provider's presence there.

(4) CTIA requests the FCC to preempt local zoning ordinances that require a variance.

According to CTIA, some localities have allegedly required providers to obtain "variances" from otherwise applicable zoning rules for all wireless siting requests, including those that do not involve any construction of new facilities whatsoever. CTIA requests that the FCC preempt local ordinances and state laws that automatically require a wireless service provider to obtain a variance before siting facilities.

CTIA contends that courts have determined that Telecommunications Act preempts local zoning ordinances that have the following characteristics:

(1) an onerous permit application process,

(2) a franchise requirement,

(3) penalties for failure to comply with ordinance requirements,

(4) subjective aesthetic design requirements, and

(5) regulations granting unfettered discretion to the zoning authority to deny permits.

CTIA further contends that some localities have subjected all wireless siting applications to a special process that in effect requires carriers to obtain a special variance—effectively a waiver—from the zoning authority. CTIA cites the following examples:

- A zoning ordinance adopted by a New Hampshire community limits wireless facilities to a height no more than 10 feet above the tree line. CTIA argues that such a limitation severely limits the coverage of a wireless facility and could effectively preclude the provider from serving the entire community, thus forcing the wireless carrier to seek a variance; and

- A zoning ordinance adopted by a Vermont community contains a setback requirement of between several hundred feet and fifteen hundred feet. Again, CTIA argues that such a limitation effectively requires a variance to construct a wireless facility in that community.

CTIA contends that applicants seeking a variance of zoning ordinances generally face a much more onerous application process; encounter much longer delay in obtaining approval; and shoulder the burden of demonstrating that a waiver is warranted—a burden allegedly unique to applicants required to seek a variance. Thus, CTIA is asking the FCC to declare that any ordinance that automatically requires a wireless carrier to seek a variance, regardless of the type and location of the proposal, is preempted as an onerous permit application process and an impermissible barrier to the ability to provide telecommunications service.

Discussion

1. Congress preserved local zoning authority.

Congress enacted the Telecommunications Act of 1996 ("Act"), 47 U.S.C. § 151 *et seq.*, "to promote competition and reduce regulation in order to secure lower prices and higher quality

services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[2] Among the technologies addressed by Congress in the Act was wireless communications services.

In regard to this technology, Congress found that "siting and zoning decisions by non-federal units of government" had "created an inconsistent and, at times, conflicting patchwork of requirements" that was inhibiting the deployment of wireless communications services.[3] At the same time, however, Congress recognized that "there are legitimate State and local concerns involved in regulating the siting of such facilities . . ., such as aesthetic values and the costs associated with the use and maintenance of public rights-of-way."[4]

To address the problems created by local zoning decisions, the House version of the Act would have given authority to the FCC to regulate directly the siting of wireless communications towers. The Conference Committee, however, decided against complete federal preemption, opting to "preserve the authority of State and local governments over zoning and land use matters except in limited circumstances."[5]

Therefore, § 332(c)(7) strikes a delicate balance between the need for a uniform federal policy and the interests of state and local governments in continuing to regulate the siting of

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[2] Pub.L. No. 104-104, 110 Stat. 56, 56 (1996); *see VoiceStream Minneapolis, Inc. v. St. Croix County,* 342 F.3d 818, 828-829 (7th Cir. 2003).

[3] H.R. Rep. 104-204, at 94 (1995); *see St. Croix County,* 342 F.3d at 828-829.

[4] *Id.*

[5] See H.R. Conf. Rep. No. 104-458, at 207-08 (1996);see *St. Croix County,* 342 F.3d at 828-829.

wireless communications facilities.[6] Under that section, state and local governments retain the authority to regulate the siting of wireless telecommunications facilities, but their decisions are subject to certain procedural and substantive limitations.[7]

Accordingly, the Telecommunications Act does not preempt State or local government from regulating the siting of wireless towers, and the FCC does not have authority to regulate directly the siting of wireless communications towers.

In particular, 47 U.S.C. § 332(c)(7), regarding the regulatory treatment of wireless services, provides in part that:

> [N]othing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.[8]

The only limitations to the local zoning authority are as follows:

(1) Its rules and decisions shall not unreasonably discriminate among providers of functionally equivalent services;

(2) Its rules and decisions shall not prohibit or have the effect of prohibiting the provision of personal wireless services;

(3) Within a reasonable period of time, it shall act on any request for authorization to place, construct, or modify personal wireless service facilities;

(4) Any decision to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence; and

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[6] 47 U.S.C. § 332(c)(7), which is reprinted in Appendix A to these Comments.

[7] See 47 U.S.C. § 332(c)(7); *see St. Croix County*, 342 F.3d at 828-829.

[8] 47 U.S.C. § 332(c)(7)(A).

(5) A decision by a governmental body denying a request may not be based upon the environmental effects of radio frequency emissions if the emissions meet FCC guidelines.[9]

Furthermore, any person who is adversely affected by any final action or failure to act by a State or local government may commence an action in court for relief. Thus, allegations that a state or local government has acted inconsistently with Section 332(c)(7) are to be resolved exclusively by the courts (with the exception of cases involving regulation based on the health effects of RF emissions, which can be resolved by the courts or the Commission).[10] Thus, other than RF emissions cases, the Commission's role in Section 332(c)(7) issues is primarily one of information and facilitation.[11]

2. Congress intended for the review periods to be *reasonable*, as opposed to establishing a "shot clock."

CTIA wants a "one-size-fits-all" approach to tower siting, but the tower and facility siting process is inherently local and fact-specific. Thus, a "one-size-fits-all" is not practical. Based on the clear, unambiguous language of Section 332(c)(7), CTIA's requested clarification of the rules is not necessary.

Under the proposed rule, if the local government fails to render a final decision by the deadline, the local government would be penalized—the penalty being the automatic approval

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[9] 47 U.S.C. § 332(c)(7)(B).

[10] 47 U.S.C. § 332(c)(7)(B)(v).

[11] This information comes directly from the FCC's website. See http://wireless.fcc.gov/siting/local-state-gov.html

of the tower siting. Such deadlines have been referred to as a "shot clock."[12]

CTIA argues that its proposed shot clock deadlines are necessary because it is allegedly unclear just when a zoning authority has failed to act, and thus, unclear when a claim becomes suitable for review in court. This argument, however, had been rejected by the U.S. Court of Appeals for the Eleventh Circuit. The Eleventh Circuit held that "term 'final action' is not defined by the statute, but its plain meaning is not ambiguous."[13] Based on the plain language of the statute, the Court concluded that a final action occurs when the state or local authority issues its written decision, but the Court also noted that a state or local government could not circumvent a party's right to commence an action by not issuing a written decision—because the Act also provides a party may file an action for a failure to act.[14] Thus, the language of the Act is plain and clear.

Further, Congress intended to give local government flexibility—the objective criteria of reasonableness—with respect to zoning issues. For cities and towns, the issue of cell tower siting has long been an issue of great concern, but the Telecommunications Act effectively balances the needs of telecommunications providers and the zoning needs of local governments. Tower siting and planning are complex matters for governments, wireless providers and citizens. The proper planning of wireless sites is critical to community aesthetics and to the safety of the public. Thus, many important issues have to be considered when addressing tower siting. For example: Is the

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[12] In basketball, the shot clock penalizes the team who holds the ball too long without attempting to make a basket.

[13] *Preferred Sites, LLC v. Troup County,* 296 F.3d 1210, 1216-1218 (11th Cir. 2002).

[14] *Id., citing* 47 U.S.C. § 332(c)(7)(B)(v).

site the least intrusive? Is the design the best possible? Is the compensation at a fair rate? What about the lease terms?

Establishing a specific time-period in which to approve a request is simply not practical. What may be reasonable time to approve an application in rural farmland in Iowa may unreasonable for a densely populated urban-area or a historical district. Recognizing that each situation is different (and that one size does not fit all) Congress preserved local zoning authority and provided that local government must act within a *reasonable* time on a request. Rules regulating the placement of towers must provide sufficient flexibility so that local zoning authority, wireless providers and citizens can adapt to individual circumstances. The Telecommunications Act itself contains expressions concerning the goal of allowing flexibility (*i.e.*, reasonableness) in tower placement.

In addition, Congress gave adversely affected parties the right to commence an action in a court of competent jurisdiction, and courts are capable of determining what is reasonable. Thus, the FCC should not create a one-size-fits-all remedy, as Congress has instead instructed the courts to oversee these issues and to award appropriate relief based on the dictates of the specific and local circumstances. In fact, courts have recognized that each situation must be *independently* examined in determination of whether local authority rendered decision in reasonable amount of time on request to construct personal wireless service facility, as required by Telecommunications Act of 1996.[15]

Also, issues regarding whether a zoning board failed to render a decision within a

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[15] *Cellular Telephone Co. v. Zoning Bd. of Adjustment of Borough of Ho-Ho-Kus,* 24 F.Supp.2d 359 (D.N.J.1998)

reasonable period of time are the least litigated, and wireless providers have generally failed to convince a court that a municipality erred in meeting this requirement.[16] Thus, such shot clocks rules are not necessary.

In addition, the proposed "shot clock" rules are backwards. The proposed rules allow the applicant to run out the clock in order to get tower siting approval. The proposed rule creates a disincentive for applicants to cooperate with the local zoning authority. In other words, if the applicant holds the ball too long, then the applicant may be rewarded with automatic site approval.

Furthermore, the proposed deadlines simply do not provide sufficient time for local zoning authorities to act on the request. For example, in addition to the exhaustive review process that must take place, and given that most municipalities hold only one legislative meeting per month, the review process and the legislative calendar would make it difficult for the municipality to meet the proposed deadlines.

Additionally, the proposed 45 and 75 day deadlines are not support by prior court decisions. For example, one court held that a six month delay was a reasonable period of time for a zoning board to mull over the permit, even though the zoning board usually took only two to three months to make such a decision.[17] Another court decided that a two and a half year delay was a reasonable period of time under the Act, even though the zoning board held over forty-five public hearings and still did not reach a firm conclusion, which perhaps signified that the board

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[16] Jeffery A. Berger. *Efficient Wireless Tower Siting: an Alternative to Section 332(c)(7) of the Telecommunications Act of 1996,* 23 Temp. Envtl. L. & Tech. J. 83, 97 (Fall 2004).

[17] *Illinois RSA No. 3, Inc. v. County of Peoria*, 963 F.Supp. 732 (C.D.Ill.1997) (A six month decision making process by defendant was not a failure to act with in a reasonable time).

was stalling in its approval process.[18] Further, another court held that a four month delay was a reasonable period of time.[19] Accordingly, the deadlines proposed by CTIA are too short and unreasonable, but in any event, they are not even necessary.

If, however, the FCC takes any action, the FCC should take a balanced approach to this issue. The FCC must examine the needs of the wireless providers, as well as the need for the local governments to preserve their zoning authority. In addition, the FCC must recognize that one size does not fit all. Local zoning ordinances may seem burdensome to telecommunications providers, but it is no greater a hurdle than that faced by all other businesses who are applying to build in any given city or town. Wireless providers should not be treated more favorably than other zoning-permit applicants.

3. Congress intended for the Courts to determine whether a local decision has the effect of prohibiting the provision of personal wireless services.

The Telecommunications Act forbids state and local decisions that "prohibit or have the effect of prohibiting the provision of personal wireless services."[20] CTIA asks the FCC to establish a rule that local government may not deny a provider's tower siting based another provider's presence in the area to be served.

There may be circumstances when the denial of the applicant's tower siting request is legitimately justified by the presence of another provider in the area, and conversely, there may

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[18] *Cellular Telephone Co. v. Zoning Bd. of Adjustment of Borough of Ho-Ho-Kus,* 24 F.Supp.2d 359 (D.N.J.1998) (A two and half year delay was not a failure to act with in a reasonable time.)

[19] *USCOC of Greater Missouri, LLC v. City of Ferguson, Mo.,* 2007 WL 4218978, 7 (E.D.Mo.) (E.D.Mo. 2007) (A four month delay was not a failure to act in a reasonable time under the Act.)

[20] 47 U.S.C. § 332(c)(7)(b)(i)(II).

be times when the application should be granted, even though the area is served by another provider.

Realizing that each situation is unique, Congress intended for the Court to determine these issues, and Congress further requires the local government to justify its denial of the tower siting with "substantial evidence." Section 332(c)(7)(b)(iii) provides:

> Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

Accordingly, Congress intended for the courts to uphold a local government's denial, if it was based on substantial evidence.

Thus, if the FCC enacts a rule that limits a local government's ability to deny a siting request, then such a rule conflicts with the Telecommunications Act—because if the local government has substantial evidence to deny the request, then Congress intended for such a denial to be upheld.

In other words, CTIA wants the FCC to change the plain, clear meaning of the law. CTIA seeks a rule that provides: Despite having substantial evidence to support its denial, a local government may not prevent a specific provider from providing service to a location on the basis of another provider's presence there. Such a proposed rule is contrary to Section 332(c)(7)(b)(iii), as the provision mandates that any decision by local government to deny a request to place wireless service facilities must be upheld, if supported by substantial evidence contained in a written record.

4. Preempting variances is contrary to Congress' intent.

CTIA argues that a variance application has the effect of prohibiting wireless service in violation of Section 332(c)(7)(B)(i)(II) of the Telecommunications Act. An application for a variance is subject to specific criteria set forth in the local zoning ordinance—generally to preserve harmony with existing structures and conformity with public interest. Further, courts have uniformly held that § 332(c)(7)(B)(i)(II) is violated only where the local regulatory agency creates a general ban against all personal wireless communication services.[21] Accordingly, a variance does not have the effect of prohibiting wireless service.

Citizens often object to towers and the antennas because they can be unsightly and bring down property values, and because they fear the possible health hazards associated with the radio waves the antennas emit. Citizens have also voiced concern and fear over falling towers.

Health issue and radio frequency emissions, however, are not issues that the local zoning authorities can address. Wireless companies are required to meet all FCC guidelines for emissions and safety. The local zoning authority can only verify that the provider is meeting the FCC guidelines.

On the other hand, the local zoning authority can certainly address issues concerning aesthetics and address fear of falling towers by establishing setback requirements. Accordingly, variances and setbacks are a necessary components required to preserve the local zoning authority.

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[21] *Omnipoint Inc., v. City of Scranton*, 36 F. Supp. 2d 222, 231 (M.D. Pa. 1999).

With respect to the local zoning authority and aesthetics, recently on May 13, 2008, the United States District Court, Northern District of Georgia held that a local zoning ordinance which established aesthetic-based guidelines for placement towers and antennas was a reasonable and proper exercise of local governments exercise of its zoning and police powers and was not preempted by Telecommunications Act.[22]

Specifically, Southeast Towers, LLC and New Cingular Wireless PCS, LLC (collectively "SE Towers") wanted to construct a 250-foot telecommunications antenna to expand its personal wireless communications system. SE Towers chose a site that was close to numerous historic sites listed on the National Register of Historic Places. The local zoning authority required SE Towers to obtain a permit for the construction of a telecommunications tower or antenna in excess of 70 feet in height, and the zoning ordinance outlined several specific "goals" to effectuate that purpose, which included:

- To locate telecommunications towers and antennas in areas where adverse impacts on the community are minimized;
- To encourage the design and construction of towers and antennas to minimize adverse visual impacts; and,
- To protect those geographic areas containing visually significant or unique natural features.

The local zoning authority denied SE Tower's permit because the tower would have a direct and adverse visual impact on the Historic District. SE Towers appealed under the Telecommunications Act seeking an injunction from local authority to issue the permit. The

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[22] *Southeast Towers, LLC v. Pickens County*, United States District Court, Northern District, Gainesville Division, Civil Action File No. 2:06-CV-0172-RWS, May 13, 2008.

District Court in Georgia denied the appeal and held that the Telecommunications Act did not preempt the local government's zoning authority, so long as local governments (1) do not unreasonably discriminate among providers; (2) prohibit personal wireless services; or, (3) limit placement of wireless facilities based upon environmental effects of radio frequency emissions.

The Court in Georgia held that the aesthetic goals of the zoning ordinance did not conflict with the Telecommunications Act because nothing in the Act forbid local authorities from applying general and nondiscriminatory standards derived from their zoning codes, and aesthetic harmony is a prominent goal underlying almost every such code.

As acknowledged by this recent decision from the Northern District of Georgia, Congress preserved local zoning authority, including the local government's right to establish setbacks and to require variances.

Thus, preempting any requirements for variances is not practical. Again, using our previous analogy, what may be reasonable setback requirement in rural farmland in Iowa may unreasonable for a densely populated urban-area or a historical district. Each situation is different, such that one size does not fit all. Furthermore, the Telecommunications Act does not prohibit setback requirements nor the requirement to obtain a variance. Stated differently, the law does not preempt local governments from regulating the siting of wireless towers. Congress specifically preserved local zoning authority. Therefore, Congress gave local zoning authorities the flexibility needed to establish rules (*i.e.,* setback requirements) that can adopt to individual circumstances.

Conclusion

The FCC should not adopt the rules being proposed by CTIA, which would significantly hinder the local zoning authority. Such rules are contrary to Congress' intent, as Congress has specifically preserved local zoning authority. Thus, a "one size fits all approach" does not work with respect to tower siting. Given that each situation is different, Congress intended for local zoning authorities to have flexibility when establishing rules concerning tower placement. Accordingly, the Commission should deny CTIA's Petition for Declaratory Ruling.

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APPENDIX
47 USC § 332(c)(7)

(7) Preservation of local zoning authority.

(A) General authority

Except as provided in this paragraph, nothing in this chapter shall limit or affect the authority of a State or local government or instrumentality thereof over decisions regarding the placement, construction, and modification of personal wireless service facilities.

(B) Limitations

(i) The regulation of the placement, construction, and modification of personal wireless service facilities by any State or local government or instrumentality thereof–

(I) shall not unreasonably discriminate among providers of functionally equivalent services; and

(II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services.

(ii) A State or local government or instrumentality thereof shall act on any request for authorization to place, construct, or modify personal wireless service facilities within a reasonable period of time after the request is duly filed with such government or instrumentality, taking into account the nature and scope of such request.

(iii) Any decision by a State or local government or instrumentality thereof to deny a request to place, construct, or modify personal wireless service facilities shall be in writing and supported by substantial evidence contained in a written record.

(iv) No State or local government or instrumentality thereof may regulate the placement, construction, and modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with the Commission's regulations concerning such emissions.

(v) Any person adversely affected by any final action or failure to act by a State or local government or any instrumentality thereof that is inconsistent with this subparagraph may, within 30 days after such action or failure to act, commence an action in any court of competent jurisdiction. The court shall hear and decide such action on an expedited basis. Any person adversely affected by an act or failure to act by a State or local government or any instrumentality thereof that is inconsistent with clause (iv) may petition the Commission for relief.